

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK
MAR 14 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2011-0240
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ERIN ELIZABETH MENDOZA,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000330

Honorable Wallace R. Hoggatt, Judge

AFFIRMED AS CORRECTED; REMANDED WITH DIRECTIONS

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz
and David A. Sullivan

Tucson
Attorneys for Appellee

Mark A. Suagee, Cochise County Public Defender

Bisbee
Attorneys for Appellant

M I L L E R, Judge.

¶1 After a jury trial, appellant Erin Mendoza was convicted of manslaughter, negligent homicide, four counts of endangerment, and criminal damage in the amount of \$10,000 or more; she also pled guilty immediately before trial to misdemeanor driving

under the influence (DUI) for driving with marijuana or its metabolite in her body.¹ On appeal, she argues the trial court abused its discretion when it denied her motions for judgment of acquittal as to the charges of manslaughter and endangerment and when it admitted into evidence a photograph of the manslaughter victim. She also argues that an error in the sentencing order requires the conviction and sentence for count sixteen be vacated and the correct judgment entered. For the following reasons, we affirm the convictions but remand this matter to the trial court so that it may issue an amended judgment that accurately reflects the jury's convictions and the guilty plea.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In the early morning hours of February 28, 2009, Mendoza drove the wrong way on Interstate 10 just east of Willcox with three children in the car. She had a near-miss with oncoming traffic, but then struck head-on a motorcycle driven by victim D.M. Moments later, a semi-truck ran over D.M.'s head. Although the medical examiner concluded D.M. died of head injuries, he could not state whether D.M. had died before or after he was hit by the truck.

¶3 Just before the accident, cameras captured Mendoza's car going up an off-ramp and then traveling east in the westbound lanes of Interstate 10. About a mile

¹Due to the complexity of the indictment (which included lesser offenses) and the clerical errors addressed *infra*, the offenses are listed in the Appendix by the superseding indictment, jury verdicts, or plea to the indictment.

after Mendoza entered the interstate, traveling in the wrong direction in the lane for slower westbound traffic, a westbound vehicle swerved into the shoulder to get out of the way of Mendoza's oncoming car. The video showed Mendoza's car changing lanes two or three times before swerving off the interstate and stopping in the median.

¶4 Department of Public Safety (DPS) Officer Chris Lentz testified that Mendoza would have passed two red and white "wrong way" signs along the off-ramp as she drove up to the interstate. Lentz also testified that as Mendoza's car entered from the left side of the interstate, she would have seen yellow lines to her right instead of left, the backs of street signs instead of the front, and red reflectors on the lane lines, which are yellow or white when approached from the correct direction. Lentz estimated that Mendoza had driven in the wrong direction for about 1.58 miles from the top of the off-ramp to the site of the collision, and six-tenths of a mile from the near-collision to the fatal collision.

¶5 The jury found Mendoza guilty of manslaughter, negligent homicide, three counts of endangerment as to the children in the car, one count of endangerment as to an unidentified driver of a car, and criminal damage. The jury found Mendoza not guilty of the remaining charges. The trial court sentenced Mendoza to concurrent prison terms, the longest of which was seven years, and consecutive terms of probation totaling seven years.²

²Mendoza was sentenced to seven years in prison for manslaughter, two years for each endangerment count as to the children, and ninety days for the DUI. She was also

Discussion

Rule 20 Motions

¶6 Mendoza argues the trial court abused its discretion when it denied her Rule 20 motions as to the manslaughter and reckless endangerment counts. A motion for judgment of acquittal under Rule 20 shall be granted where “there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a). When a trial court denies a Rule 20 motion, the reviewing court must determine de novo “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). “Substantial evidence,” as required under Rule 20, may be both direct and circumstantial. *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Further, “[w]hen reasonable minds may differ on inferences drawn from the facts, the case must be submitted to the jury, and the trial judge has no discretion to enter a judgment of acquittal.” *Id.* ¶ 18, quoting *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997).

Count 1: Manslaughter

¶7 Mendoza argued in her Rule 20 motion and on appeal that there was insufficient evidence to support a finding of recklessness, specifically focusing on the amount of time she had to react to on-coming traffic and whether she consciously

sentenced to three years’ probation for endangerment of the unidentified driver of the car and a consecutive sentence of four years’ probation for damage to D.M.’s motorcycle.

disregarded the risk during that time period. We agree with the state that the amount of time available to Mendoza must be measured in the particular circumstances to determine if she was reckless. Further, the particular circumstances of this case were properly reserved for the jury to resolve arguably conflicting inferences.

¶8 A person commits manslaughter by “[r]ecklessly causing the death of another person.” A.R.S. § 13-1103(A)(1). Recklessly means “with respect to a result or to a circumstance described by a statute defining an offense . . . a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists.” A.R.S. § 13-105(10)(c).

¶9 The evidence established Mendoza had driven up an off-ramp, passing two “wrong way” signs and entering the interstate from the left-hand side. Cameras showed Mendoza’s car traveling for about a mile in the wrong direction, before forcing an oncoming car off the road, changing lanes and continuing on for another six-tenths of a mile before finally pulling into the median to stop after colliding with D.M.’s motorcycle. DPS officers later reenacted the route, recording video along the way. The video showed the “wrong way” signs, the yellow line to the right instead of the left, lane line reflectors that showed red instead of yellow or white when viewed from the wrong direction, the backs of street signs, and a commercial truck weigh station to her left instead of her right.

¶10 Mendoza does not generally dispute this evidence, but counters that the absence of avoidance driving means she had “practically no factual basis” for realizing she was driving the wrong way. Instead, she asserts, the evidence shows that it was not

until the near-collision with a vehicle that she noticed something was wrong, slowed down from sixty-one miles per hour to fifty-seven, changed lanes, and took other steps to avoid a collision. From these selected facts, she concludes, there was no evidence of conscious disregard of the risk her driving posed to others.

¶11 The jury was required to resolve the competing inferences that could be drawn from Mendoza’s driving prior to the fatal collision. Reasonable jurors could have found Mendoza had been aware of and consciously disregarded a substantial and unjustifiable risk that other motorists could be injured, a gross deviation from the standard conduct of a reasonable person. *See Rodriguez v. Texas*, 352 S.W.3d 548, 552-553 (Tex. App. 2011) (jury could reasonably find recklessness where construction worker with pick-up truck and trailer weaved through construction zone at high rate of speed); *see also State v. Miles*, 211 Ariz. 475, ¶ 27, 123 P.3d 669, 676 (App. 2005) (reasonable jurors could have found recklessness where driver failed to stop or slow down at visible stop sign).

¶12 Finally, Mendoza argues the convictions for both manslaughter and negligent homicide suggest the jury had difficulty agreeing on the appropriate mental state. Negligent homicide is generally a lesser-included offense of manslaughter because the only difference between the two is the applicable mental state. *State v. Nieto*, 186 Ariz. 449, 456, 924 P.2d 453, 460 (App. 1996) (manslaughter requires awareness of risk whereas negligent homicide only involves failure to perceive the risk). Further, “[i]f a statute provides that criminal negligence suffices to establish an element of an offense,

that element also is established if a person acts intentionally, knowingly or recklessly.” A.R.S. § 13-202(c). The manslaughter verdict necessarily included a finding of criminal negligence. *Id.* Moreover, the trial court properly dismissed the conviction for negligent homicide. *See State v. Jones*, 185 Ariz. 403, 407, 916 P.2d 1119, 1123 (App. 1995) (conviction on two counts for single act requires court to vacate lesser conviction).

Reckless Endangerment

¶13 Mendoza also contends the trial court erred when it denied her Rule 20 motions on the four reckless endangerment offenses. The record establishes, however, that Mendoza abandoned any Rule 20 motion on the three reckless endangerment offenses related to the children who had been in her car. Although defense counsel initially included those counts among those to which his motion was to pertain, during the course of the discussion regarding the Rule 20 motion he made clear he was not including them. Counsel stated, “[L]et’s skip the endangers,” and proceeded to discuss only three specific child abuse charges. The court clarified this further, expressly stating it was denying the Rule 20 motion on the three counts of child abuse, offering defense counsel the opportunity to argue further Rule 20 motions as to other charges. But counsel conceded the motion did not pertain to the endangerment charges that related to the children. No such motion having been made, we need not address further Mendoza’s argument that the court abused its discretion in denying it.

¶14 To the extent Mendoza’s argument can be construed as challenging the sufficiency of the evidence, she has not sustained her burden. We will only disturb the

jury's verdicts if it "clearly appear[s] that upon no hypothesis whatever is there sufficient evidence to support" them. *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶15 The state was required to prove that Mendoza recklessly endangered the children with a substantial risk of imminent death. *See* A.R.S § 13-1201(A). As noted above, by driving the wrong direction on the interstate despite signs and road characteristics, and continuing for more than half a mile after forcing another car off the road, there was sufficient evidence from which reasonable jurors could find Mendoza disregarded a substantial risk that her conduct would cause imminent death. *See Miles*, 211 Ariz. 475, ¶ 27, 123 P.3d at 676. Furthermore, reasonable jurors could conclude that the children were in actual substantial risk of imminent death because they were passengers in the car Mendoza drove into oncoming traffic.

¶16 We next turn to Mendoza's challenge to the denial of her Rule 20 motion on the charge of endangerment of the unidentified car driver. In her Rule 20 motion on this count, Mendoza argued that the state had not provided substantial evidence that the other driver was actually endangered; further, the absence of identification prevented a conviction.

¶17 Mendoza essentially abandons her Rule 20 arguments in the trial court, instead incorporating her arguments on manslaughter regarding the culpable mental state of recklessness. Arguments not made to the trial court are forfeited absent a finding of fundamental error. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991).

Moreover, she has not established the court abused its discretion when it denied the Rule 20 motion because, as noted above, there is substantial evidence from which reasonable jurors could find Mendoza acted recklessly, and the driver of the car forced off the road was placed in substantial risk of imminent death.

¶18 To the extent that Mendoza's reference to a compromise verdict is actually an attempt to argue that there was insufficient evidence supporting the jury's verdict, she again has not met her burden. As Mendoza concedes in her opening brief, the mere possibility of a compromise verdict alone is not a sufficient ground for reversal. *State v. Van Winkle*, 149 Ariz. 469, 471, 719 P.2d 1085, 1087 (App. 1986). Further, inconsistent verdicts may simply reflect leniency. *State v. Garza*, 196 Ariz. 210, ¶ 7, 994 P.2d 1025, 1027 (App. 1999). Most important, the jury found Mendoza's reckless conduct caused D.M.'s death, which is not inconsistent with the conclusion she endangered other drivers in her path.

Admission of the Photograph

¶19 Mendoza also contends the trial court abused its discretion when it admitted a photograph of D.M.'s body where it was found on the highway. She argues the photograph was irrelevant and, alternatively, the gruesome nature of the photograph rendered it unfairly prejudicial. We review rulings on the admissibility of evidence for an abuse of discretion. *State v. McGill*, 213 Ariz. 147, ¶ 30, 140 P.3d 930, 937 (2006).

¶20 Mendoza contends that the photograph was irrelevant because she was not disputing that D.M. had died as the result of the vehicle collision. Before trial, however,

the state filed a motion in limine seeking to preclude Mendoza from raising claims of intervening or superseding cause of death and from arguing whether D.M. had been killed when he was struck by Mendoza's car or when he was run over by the semi-truck. Mendoza opposed the motion, arguing the state had the burden of proving that the victim's death was not the result of a superseding cause. The trial court ruled that Mendoza would not be permitted to argue superseding or intervening causation "unless and until the court approves a jury instruction upon which such an argument may be based." At the time the photograph was admitted, jury instructions had not been settled. Therefore, because at the time Mendoza objected to the photograph there was still the possibility that superseding cause might be an issue for the jury to resolve, the evidence was relevant.

¶21 Moreover, even if intervening or superseding cause of death were not at issue, the state had the burden of proving causation. *State v. Sucharew*, 205 Ariz. 16, ¶ 32, 66 P.3d 59, 68-69 (App. 2003). At trial, Officer Lentz testified about the photograph, using it to describe the position and condition of D.M.'s legs, and stating that they appeared to have been broken. The photograph corroborated Lentz's testimony about the nature and extent of the injuries to D.M.'s legs and provided context for the progression of the two-part collision. As the trial court noted, the photograph was probative of the condition of the victim's legs and established that he would not have been able to get out of the way of the truck.

¶22 Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice. Ariz. R. Evid. 403. In determining whether to admit disturbing photographs into evidence, trial courts must “consider the photographs’ relevance, the likelihood that the photographs will incite the jurors’ passions, and the photographs’ probative value compared to their prejudicial impact.” *McGill*, 213 Ariz. 147, ¶ 30, 140 P.3d at 937, *citing State v. Davolt*, 207 Ariz. 191, ¶ 60, 84 P.3d 456, 473 (2004). We will reverse on appeal if “gruesome evidence is admitted for the *sole purpose* of inflaming the jury.” *State v. Spreitz*, 190 Ariz. 129, 141, 945 P.2d 1260, 1272 (1997), *quoting State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982) (emphasis in *Spreitz*).

¶23 The trial court noted that the photograph was gruesome, but not such that it outweighed the probative value. It depicts the victim’s body from the side, illustrating that his legs were broken, and the majority of the victim’s head is obscured due to the angle at which the photograph was taken and the placement of his jacket. The court did not abuse its discretion in admitting the photograph. *See State v. Murray*, 184 Ariz. 9, 28-29, 906 P.2d 542, 561-62 (1995).

Amendment of the Sentencing Order

¶24 Finally, Mendoza contends her “conviction and sentence on count sixteen should be vacated and the correct judgment entered.” Mendoza pled guilty to count sixteen based on having driven or been “in actual physical control of a vehicle in this State while there was marijuana, or its metabolite, in her body.” However, as Mendoza

notes, the description of the offense in the June 30, 2011 sentencing minute entry incorrectly states that Mendoza “[c]aused a substantial risk of death to [E.W.]” This appears to be a clerical error, simply repeating the offense description from the previous page of the minute entry.

¶25 If there is a conflict between a written judgment and the oral pronouncement of sentence, the judgment must be corrected to be consistent with that orally pronounced sentence and other records that make clear the trial court’s intent. *See State v. Vargas-Burgos*, 162 Ariz. 325, 327, 783 P.2d 264, 266 (App. 1989). We agree there is an error in the minute entry for count sixteen. We therefore remand this matter to the trial court with directions to amend the “offense” description in its minute entry to reflect that, with respect to count sixteen, Mendoza pled guilty to misdemeanor DUI.

¶26 In reviewing the record, we also discovered that the June 30 minute entry erroneously provides that Mendoza was found guilty of count fourteen of the superseding indictment, endangerment based on “substantial risk of imminent death to an unidentified driver of a pick-up truck on Interstate 10.” That count was dismissed during trial after the state conceded it had not presented evidence in support of this charge. Rather, the jury found Mendoza guilty of count thirteen of the superseding indictment (count twelve as presented to the jury), which was based on endangerment of the driver of the unidentified car. Thus, we remand to the trial court to amend its minute entry, changing the number therein for count fourteen to count thirteen of the superseding indictment and amending the description to reflect that Mendoza “caused substantial risk of imminent

death to an unidentified driver of a car on Interstate 10.” Likewise, the sentence for count fifteen of the superseding indictment, which states that Mendoza will serve probation consecutively to the sentence “imposed for Count 14,” must be modified to state that it is consecutive to the sentence “imposed for Count 13.” This will properly reflect the signed verdict forms and the oral transcript of the sentencing.

Disposition

¶27 For the foregoing reasons, Mendoza’s convictions and sentences are affirmed as corrected. We remand this matter to the trial court with directions to amend its June 30, 2011 minute entry consistent with this decision.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

Appendix

Count in Superseding Indictment	Count presented to jury for verdict	Offense	Disposition
1	1	Manslaughter	Guilty
2	2	Negligent Homicide	Guilty—Dismissed post-trial by agreement
3	3	Child abuse (knowingly) as to C.R.	Not Guilty
4	4	Child abuse (knowingly) as to C.M.	Not Guilty
5	5	Child abuse (knowingly) as to E.W.	Not Guilty
6	6	Child abuse (recklessly) as to C.R.	Not Guilty
7	7	Child abuse (recklessly) as to C.M.	Not Guilty
8	8	Child abuse (recklessly) as to E.W.	Not Guilty
9	9	Endangerment as to C.R.	Guilty
10	10	Endangerment as to C.M.	Guilty
11	11	Endangerment as to E.W.	Guilty
12		Endangerment as to M.G.	Dismissed before trial
13	12	Endangerment as to unidentified driver of car	Guilty
14		Endangerment as to unidentified driver of pick-up truck	State’s Rule 20
15	13	Criminal Damage	Guilty
16		Misdemeanor DUI	Pled Guilty before trial